
UNITED STATES

v.

SALIM AHMED HAMDAN

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)
) DEFENSE REQUEST FOR
) WITNESS ON
) MERITS/SENTENCING:
) XXXX
)
) 26 October 2004
)

1. Witness Request – XXXX - US. v. Hamdan.

2. XXXX is the witness's name. We are unaware of an alias. We are unaware of any mailing address but we do know that she is a resident of the capital city of XXX and resides with her XXXX, Mr. XXXX, another witness requested by the Defense. She may be contacted through the International Committee for the Red Cross or through Defense Counsel. The phone number for contact with this witness is XXXX. We are unaware of any e-mail address for this witness. This witness speaks only Arabic with a XXXX dialect and will require the use of a translator.

3. Mrs. XXXX is the XXXX to the defendant. She has had significant personal contact with Mr. Hamdan. Mrs. XXXX can testify as to the reputation of the defendant's character among the community, the reason for the defendant returning to Afghanistan in 2000, the defendant's character for truthfulness, and the defendant's character for peacefulness. More specifically, the defendant's XXXX's testimony is expected to include (but is not limited to) the following information.

- Character in the community and character for peacefulness. That Mr. Hamdan had a very caring personality and her opinion was that Mr. Hamdan had a very large heart and would always care for her. For example, after first being introduced into the family, Mr. Hamdan's XXXX (not yet XXXX) became very sick and was in the hospital for an extended period of time. Mr. Hamdan was at her side in the hospital and later in the home, making sure she had everything she needed including water, food, and medicine. That no one in the family spent as much time with her during this time as Mr. Hamdan. Further, his reputation in the community was similar, that Mr. Hamdan was always very caring towards others in the community and was not afraid to show his affection towards his family when he was in the community. In addition to caring for his XXXX, Mr. Hamdan was often helping his wife in the kitchen and with other household chores. That he encouraged all the women of the family to exercise their rights, including the right to vote. That he would take his wife out to dinner, and that he would take the entire family out to dinner. He would often risk teasing from the men in the family for his behavior but he would defend his actions and explain that all men should treat their families in the same manner. This is relevant to the Defense

case because it directly contravenes the Government's case that Mr. Hamdan is a violent and hostile person.

- Reason for returning to Afghanistan in 2000. That Mr. Hamdan had accompanied his XXXX to XXXX for the Haji when his father-in-law was sick and nearing death. During this time, the Yemeni authorities arrived at the family home in Yemen and it was rumored that they were looking for men to arrest as part of the investigation into the USS Cole bombing in order to satisfy the U.S. As a result of this and before the family returned to Yemen, the family sat down and had a family discussion regarding whether Mr. Hamdan should return to Yemen with his wife (XXXX) as previously planned. The family decided that it would be best if Mr. Hamdan took his wife and children back to Afghanistan rather than return to Yemen. This is relevant to the defense case because it directly contravenes the Government's assertion that Mr. Hamdan was in Afghanistan for any Al-Queda related purpose.

4. Detailed Defense Counsel has spoken to Mrs. XXXX through a translator and Mrs. XXXX has verbally stated her intentions and her desire to testify on Mr. Hamdan's behalf.

5. We anticipate calling this witness in the Defense case-in-chief and sentencing proceedings. We do not anticipate calling this witness for any preliminary or evidentiary hearings however, we reserve the right to call her in such case should circumstances change and require us to do so.

6. Detailed Defense Counsel last spoke with Mrs. XXXX via a translator on July 24 and this communication was in person. Also, when Detailed Defense Counsel last spoke with Mrs. XXXX she stated she would be available to testify at Mr. Hamdan's trial in December.

7. Detailed Defense Counsel requests that Mrs. XXXX be present to testify on Mr. Hamdan's behalf. We do not agree to an alternative to live testimony because that would deprive the finders of fact and law from asking this witness substantive questions the counsel may not anticipate.

8. No other witness can be called to attest to the facts known by Mrs. XXXX. In other words, her testimony is not cumulative to any other witness who will be called by the Government or the Defense.

9. This is a lay witness.

10. We do not submit any other matters for your consideration.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, U.S. Navy
Detailed Military Defense Counsel
Office of Military Commissions

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UNITED STATES OF AMERICA)	PROSECUTION RESPONSE TO
)	DEFENSE REQUEST FOR
v.)	WITNESS: XXXX
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SALIM AHMED HAMDAN)	25 October 2004
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The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense’s Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.
2. Response to paragraph 3. . The Prosecution does not believe the content of the proffer is sufficient. To assess the probative value of the testimony and take a meaningful position on whether the person should be produced for live witness testimony, it adds little to the analysis to merely state that she knows “the reason for the defendant returning to Afghanistan in 2000 (unable to assess the probative value without knowing the reason).

Additionally, because much of the testimony will relate to second-hand knowledge and merely repeating what the Accused allegedly told her, we do feel this impacts the analysis in paragraphs 7 and 8.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.
4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.
5. Response to paragraph 6. The Prosecution has no objections or supplements to this paragraph.
6. Response to paragraph 7. POM 10, paragraph 4g requires the requestor to state whether they agree to an alternative to live testimony to present what is described in the

synopsis, “or the reasons why such an alternative is NOT acceptable.” The POM goes on to say that “It is unnecessary to state that live testimony is better than an alternative. . .” The Defense has arguably set out a reason why depositions and stipulations cannot be used, however this stated reason would apply to every potential witness in these proceedings. Their stated concerns do not address the viability of video teleconference (VTC) or telephonic communication with this witness¹. Because the Defense has not complied with the requirements of POM 10 at this time, the Prosecution cannot take a position on the feasibility of taking this testimony by alternative methods.

7. Response to paragraph 8. The Defense states that no other witness *can* be called to attest to the facts known by this witness. This is not even internally consistent with the Defense’s own submissions for two other witnesses they have requested from Yemen. Cumulative with the proffered testimony of this witness, XXXX and XXXX are also proffered to provide testimony concerning:

- a. the Accused’s character for peacefulness;
- b. the Accused’s character for truthfulness; and
- c. the Accused’s reason for returning to Afghanistan in December 2000.

The Prosecution fully acknowledges that the Accused cannot be required to testify. However, it is misleading to state that no other witness *can* be called to attest to these same facts.

8. Response to paragraph 9. The Prosecution has no objections or supplements to this paragraph.

9. Conclusion. For the reasons mentioned above, the Prosecution requests that this witness be denied. The proffer is insufficient to adequately make an assessment and appears to be cumulative with the proffered testimony of other witnesses. Alternatively, the Prosecution asks that this witness, currently located in Yemen, be allowed to testify in a manner other than appearing personally.

XXXX
Commander, U.S. Navy
Prosecutor

¹ It is the Prosecutions position that the stated reason for needing the witness live is tantamount to saying “live testimony is better than an alternative,” which is specifically mentioned in the POM as being insufficient grounds for a live-witness request. We assert that the Defense has not complied in any way with POM 10’s requirement regarding this paragraph.

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UNITED STATES OF AMERICA)	Defense Reply to
)	PROSECUTION RESPONSE TO
v.)	DEFENSE REQUEST FOR
)	WITNESS: XXXX
SALIM AHMED HAMDAN)	D 32
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)	28 October 2004
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The Defense in the above-captioned case hereby files the following reply and request for the production of the above witness. In support of this request, the Defense answers the Prosecution’s response as follows:

1. Reply to Prosecution Response to paragraph 3. Mr. Hamdan’s words and actions are directly relevant to his mental state and are tend to rebut any circumstantial or direct evidence that Mr. Hamdan had entered into an a criminal agreement with Osama Bin Laden.

2. Reply to Prosecution Response to paragraph 7. The Defense does not believe that alternative to live testimony are feasible in this case further the defense would not agree to such alternatives. The witness will offer testimony tending to rebut the core of the Prosecution’s case. The Defense, however, is aware that the witness is a family member of the accused and that witness bias will undoubtedly be at issue. As such the Commissions ability to assess the witness credibility is essential to a fair proceeding

3. Reply to Prosecution Response to paragraph 8. The Prosecution mischaracterizes the Defense assertion that the witness is not cumulative. The witness is offered for unique factual testimony. The fact that portion of the witness testimony overlaps does not change this fact nor does the Prosecution’s assertion that Mr. Hamdan could testify to the facts in question. Such a rule is not in keeping with Mr. Hamdan’s right to present a defense. If testimony of this witness is somehow "cumulative," and therefore excludable, it would guarantee the exclusion of virtually all of the evidence being sought to be introduced by the prosecution in this trial. To infer that Mr. Hamdan’s potential testimony is any way related to this issue is singularly in appropriate and demonstrates a complete absence of an understanding of judicial principals and if adopted would preclude the need for the production of any witness

4. Conclusion. For the reasons set out in it request for production of the witness and this reply, the Defense requests the production of this witness

Charles D. Swift
Lieutenant Commander, U.S. Navy
Detailed Defense Counsel

From: XXXX CIV (L)
Sent: Friday, October 29, 2004 3:15 PM
To: XXXX CIV (L); 'Swift, Charles, LCDR, DoD OGC'; 'Neal Katyal'
Cc: XXXX, CDR, DoD OGC'; 'Swann, Robert, COL, DoD OGC'; XXXX LtCol, DoD OGC'; XXXX; XXXX, COL, DoD OGC'; XXXX, Cpt, DoD OGC'; XXXX; XXXX, GySgt, DoD OGC'; 'Gunn, Will, Col, DoD OGC'; Brownback, Peter E. COL (L)

Subject: United States v. Hamdan - Deferral of Decision - D32

The Presiding Officer has reviewed the witness request in D32. A decision on this request will be made at a later time but not before counsel appear at Guantanamo.

XXXX
Assistant to the Presiding Officers
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Voice: XXXX
Fax: XXXX